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No. 80-2070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SUMITOMO SHOJI AMERICA, INC.,

Petitioner,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CHRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Sumitomo Shoji America, Inc. ("Sumitomo") has asked this Court to consider the question of whether the right provided by Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063 (1953) (the "Treaty"), to fill management level positions with Japanese nationals, is limited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Three recent United States District Court decisions support Sumitomo's contention that its petition raises an important question warranting the grant of certiorari by this Court.

In an unreported decision dated September 9, 1981, the United States District Court for the Northern District of Illinois, in *Porto v. Canon, U.S.A., Inc.* (No. 81 C 1305)

(Decker, J.), denied a motion made by the defendant, a United States subsidiary of a Japanese corporation, to the extent it relied on the employment provision of Article VIII(1) of the Treaty in requesting an order dismissing plaintiff's Title VII claim. App. A, *infra*, 1a-12a. That District Court expressly rejected the decision of the Second Circuit below, and the majority decision of the Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981), *reh. en banc granted* (Aug. 7, 1981), and instead relied wholesale on the dissenting opinion in *Spiess*, *supra*, which argued that a U.S. subsidiary of a Japanese investor cannot invoke the Treaty's employment provision. It also indicated, however, that the authority of *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), would require dismissal of plaintiff's Title VII claim if it is shown that the "defendant is discriminating only in favor of Japanese *citizens*, and not in favor of persons of Japanese national origin . . . . " *Porto*, App. A, *infra*, at 11a, n.3.

In a second unreported decision, dated October 1, 1981, the United States District Court for the Northern District of Illinois, in *Mattison v. Canon U.S.A., Inc.* (No. 81 C 1304) (McMillan, J.), also expressly rejected the decisions of the Second and Fifth Circuits and concurred with the dissent in *Spiess*, *supra*, holding that a United States subsidiary of a Japanese corporation is not within the coverage of Article VIII(1) of the Treaty. App. B, *infra*, 13a-16a. However, unlike the decision in *Porto*, *supra*, the *Mattison* decision fails to recognize that the authority of *Espinoza*, *supra*, might warrant dismissal of that action.

In a third unreported decision, dated October 2, 1981, the United States District Court for the Eastern District of New York, in *Linskey v. Heidelberg Eastern, Inc.* (No. 77 C 833) (Costantino, J.), denied for the second time the defendants' motion for summary judgment or dismissal made in reliance on an employment provision in the Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of Denmark, 12 U.S.T. 908 (1961), comparable to

Article VIII(1) of the Treaty with Japan.* App., C, *infra*, 17a-23a. That District Court predicated its analysis on the premise that "in the absence of legislative history demonstrating that Title VII was not intended to override the provisions of The Danish Treaty, this court must abide by its prior decision and the authority of *Avigliano*." App. C, *infra*, at 22a. The District Court in *Linskey* also assumed that Title VII is an equal protection statute, *id.*, and ignored the teaching of this Court in *Espinoza*, *supra*, that ". . . nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage." 414 U.S. at 95.

The District Courts in *Porto*, *Mattison* and *Linskey* erred in failing to give full recognition to international treaty obligations of the United States. Those decisions illustrate the wide divergence of views among United States courts which have considered the question raised in Sumitomo's petition and thus further support Sumitomo's contention that this case justifies the grant of certiorari by this Court.

Respectfully submitted,

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* The District Court's first decision in *Linskey* is reported at 470 F. Supp. 1181 (E.D.N.Y. 1979) and is referred to in Sumitomo's petition at 9, n. 6.